86-32

Supreme Court, U.S.
FILED
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1986

CARL WIDMER,

Petitioner

v.

RAYMOND F. WIDMER, EXECUTOR OF THE ESTATE OF WALTER WIDMER, Deceased

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARKANSAS

William P. Walters*

WALTERS LAW FIRM, P.A.
#18 Town Square
P. O. Box 280
Greenwood, Arkansas 72936
(501) 996-2122

Attorneys for Petitioner
**Counsel of Record*

83PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state can consistently and effectively deny United States Constitution 14th Amendment rights of self-dignity, full self-expression, due process, and equal protection in the administration and enforcement of its Probate Law. Its basic concepts on undue influence and related activities being so stated and enforced; that effectively, no substantive presence of due process and equal protection in reality exists. The effective result being: that both persons who execute Wills; and those who's interests were negated by the improper or undue influence are totally or effectively denied basic 14th Amendment rights

2. Whether the need for a policy statement by this Court exists, as to the basic role and function of the discovery process; and the definition of a control and supervision standard, which will ensure and facilitate effective discovery; so as assure and afford basic due process and equal protection to all who seek or are forced to seek judicial redress to protect their rights and interests.

TABLE OF CONTENTS

	Page
Table of authorities	iii
Opinions below	1
Jurisdiction of this Court	2
Constitutional provisions involved	2
Statement of the case	3
14th Amendment pleading issue	4
Reasons for granting the petition	6
Point 1 The issue: That current Arkansas Probate concepts fail to afford, provide and protect basic 14th Amendment rights: such as, the meaningful protection of basic human rights of self dignity and full self-expression; as well others	6
Point II The issue: Need for a policy statement by this Court, as to basic role and function of the discovery process; and the definition of a control and supervision standard, which will ensure and facilitate effective discovery	10
Conclusion	12
Appendix A (Opinions Below)	1a
Appendix B (portion of Probate Court Record)	1b
Appendix C (Appellate Court Motions, Petitions and Brief Arguments)	1c

TABLE OF AUTHORITIES

Page

Cases:

Brown v. Board of Education of Topeka, 347 U.S. 483 ..... 6, 7, 11

Wood's Estate, In re, 374 Mich. 278, 132 N.W.2d 35, 5 ALR3d 1 (1965) 8, 9

Constitutional Provisions:

U.S. Constitution
XIV Amendment Sec. 1 ..... i, 2, 3, 4, 5, 6, 7, 10, 11

Statutes:

28 U.S.C. Sec. 1257(3) 2

Miscellaneous:

Brazil, Wayne D., Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 A.B.F. Res. J. 217; and *id.,* Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 A.B.F. Res. J 787 ..... 10, 11

IN THE

Supreme Court of the United States

October Term, 1986

No._____

CARL WIDMER,

Petitioner

v.

RAYMOND F. WIDMER EXECUTOR OF THE ESTATE OF WALTER WIDMER, Deceased,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARKANSAS

A Writ of Certiorari is respectfully sought to review the Arkansas Court of Appeals Opinion and Judgment rendered February 26, 1986.

OPINIONS BELOW

The Arkansas Court of Appeals, Div. II Opinion and Judgment is not reported; it being stamped "NOT DESIGNATED FOR PUBLICATION". The Opinion is appended hereto (App. A, infra, 1a). The Probate Court's Order admitting the Will of Walter Widmer to probate is appended (App. A, infra, 6a).

JURISDICTION

The Opinion and Judgment of the Arkansas Court of Appeals on which review is sought, was rendered February 26, 1986 (App. A, infra 1a). On March 14, 1986 a timely filed, Petition For Rehearing and Brief was filed with the Arkansas Court of Appeals (App. C, infra 33c; see App. A, infra 9a for set out of Rehearing Rule provision, Rule 20). On this same date (March 14, 1986) a Petition For Review (with attachment as provided by Ark. Supreme Court Rule 29) was filed with the Arkansas Supreme Court (App. C, infra 42c). The Petition For Review being also timely and in accord with provisions of Arkansas Supreme Court Rule 29 of Rules of the Supreme Court and Court of Appeals of the State of Arkansas, see Appendix for Rule 20 & 29 provisions (App. A, infra 9a).

On April 2, 1986, the Arkansas Court of Appeals made the following order: "Petition for Rehearing is denied." (App. A, infra 4a). On April 14, 1986, the Arkansas Supreme Court made the following order: "Petition for Review is denied. Purtle, J., not participating." (App. A, infra 5a).

The statutory provision believed to confer on this Court, jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, United States Constitution, Section 1, states:

AMENDMENT 14

§ 1. [Citizenship — Due process of law — Equal protection.] — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The formal proceeding at the Probate Court level involved issues of undue influence in the procurement and making of a Will; and the admission of the contested Will to probate.

Discovery response, procedure, and supervision became issues during the Probate Court proceeding.

The deceased, Walter Widmer was and is survived by two sons: Carl Widmer (petitioner in this Court) and Raymond F. Widmer (respondent, this Court).

Raymond F. Widmer (petitioner in the Probate Court) in the summer of 1975 selected the law firm (Warner Law Firm) which drafted the Will at issue; made the appointment at which Will was drafted, with selected firm's Will Attorney (Robert Taylor); attended Will drafting session and participated in discussion of Will provisions at this drafting session (August 14, 1975); received and reviewed draft copy

of Will, and communicated with Will drafting attorney (Robert Taylor) as to draft copy of Will, prior to the execution of the Will on September 4, 1975. Executed Will of Walter Widmer was retained by the drafting law firm (Warner Law Firm) until after his death. (Raymond F. Widmer's response to discovery and testimony at October 8, 1984 hearing — Probate Court Record pages 27, 28, 29, 30, 49, 50, 79, 80, 208, 212, 213, 214, 216, 217 and 219. A portion of this record is set out in Appendix B. Attorney Robert Taylor's testimony at the October 8, 1984 hearing, Probate Court Record pages 187, 188, 191, 201, 202, 203 and 205).

There was no formal, verbatim pleading of 14th Amendment provisions; the concept, intent, and spirit of the 14th Amendment's due process (substantive and procedural) and its equal protection provisions were contended in pleadings, briefs and argument at both the Probate Court and Appellate Court level as to issues presented. Appendix C contains complete copy of Appellate Court brief arguments and motions made in the Appellate Courts, for this Court's review. Additionel discussion of this point appears below.

14th AMENDMENT PLEADING ISSUE

To insist on a "pure" absolute, verbatim pleading of the 14th Amendment of the United States Constitution in the context of this case; would be the equivalent of requiring adherence to early 19th century pleading concepts in a federal or state court today. That is, everyone today is fully aware of the 14th Amendment's role, function, and intent. Additionally, if there is anything to the concept known as "Judicial Notice or

Knowledge"; than the 14th Amendment concepts of due process and equal protection should be within its basic area of Notice and Knowledge; and the need to consider and apply these basic concepts to all deliberations.

Additionally, it is only after a court has acted on all that has been contended, argued and presented; can what has occurred be evaluated. That is, was due process both in substantive and procedural sense and equal protection afforded not only as to the actual participants in the litigation; but equally important were society's interests and rights and those who in time will face like situations (the entire probate concept) afforded protection of interests.

REASONS FOR GRANTING THE PETITION

POINT I

THE ISSUE: THAT CURRENT ARKANSAS PROBATE CONCEPTS FAIL TO AFFORD, PROVIDE AND PROTECT BASIC 14th AMENDMENT RIGHTS; SUCH AS THE MEANINGFUL PROTECTION OF BASIC HUMAN RIGHTS OF SELF DIGNITY AND FULL SELF-EXPRESSION; AS WELL AS OTHERS.

If this Court in 1954 thought psychological knowledge and research sufficiently mature to support its decision in *Brown v. Board of Education of Topeka,* 347 U.S. 483; then should not today over 30 years later, the concepts and knowledge of psychology and the behavioral sciences in total be given at least equal status of validity and equal relevance.

"Brown type" policy arguments were presented to the Arkansas Appellate Courts, Appendix C contains arguments and pleadings made in the Arkansas Appellate Courts; for this Court to review if it so wishes.

If the question or contention be made — why this? Then the question — why *Brown?* For if *Brown* was valid in 1954 and still is considered valid; then this petition should be afforded equal status of validity; for surely the elderly enjoy equal protection and status. For all the contentions and arguments ever made in support of *Brown* are applicable here with equal force; plus, additional ones that could not be contended in *Brown;* factors and arguments that are unique to the elderly.

True, the fact situation is in part the product of a Will contest; but a far more basic situation exists; for this Court to consider. That is, the total probate concept; and how it deals with and protects the interest of all, particularly the elderly. For this Court in this petition is presented with a situation as to Probate; that is fully the equal of the school situations that *Brown* was concerned with in 1954.

And if the argument be made, that this is solely a "state matter" to be handled as each state sees fit. with no need of action or concern on the part of this Court; then the contender must be contending; that the elderly have fewer rights than school children. For with equal force: the "state matter" argument is still being made and contended by some publicly; as to what this Court has said and is saying on education. "State matter", having also been the principal argument of the opposition to "civil rights" and voter rights.

The reason this Court became involved in these areas was that the states were not providing, or ensuring that basic constitutional rights were being provided and protected; which is what this petitioner is contending and arguing as to the areas that are at issue here; be they substantive, procedural or both. That is, that basic constitutional rights have not and are not being protected or provided in the Probate Area of the law; both in Arkansas and the rest of the United States to varying degrees on a daily basis.

In large measure, the entire presentation at the appellate level was a presentation of substantive and procedural due process and effective "equal protection" issues and arguments.

At issue here, is the protection and promotion of basic human dignity. To wit, that the elderly need not fear undue influence.

This case presents discrete, critical, on going issues that by their very nature will be continuing and demanding more and more of this nation's total judicial resource at all levels; until such time, as effective and honest appreciation of what is actually occurring is acknowledged and dealt with effectively.

The major defect with support or argument for the traditional attitude on the validity of Will executions; is that it provides for no honest safeguards to prevent or preclude rewarding and encouraging misdeed. The only argument that any court ever espouses as a defense for the traditional attitude; is to cite and quote whatever number of cases it thinks are needed, and which support the contention. Hardly an insightful analysis of the social and ethical and most importantly; the emotional and mental stress aspects of all persons who execute Wills.

No legal concept or system is fail-safe; but the *Wood case* concept (*in re Wood's Estate,* 374 Mich. 278, 132 N.W.2d 35, 5 ALR3d 1 (1965) provides a far more certain system, to preclude rewarding and encouraging mis-deed than the current Arkansas concept. Additionally, the Wood case concept provides some honest protection for "free self-assertion" for the elderly; and all others as well — "free self-assertion" being deemed a basic human right by all. As basic as any right this Court has ever deemed protected by any provision of the Constitution.

Petitioner is aware of recent thoughts expressed by the Michigan Courts on presumptions; and the policy arguments pro and con as to the relative merit of current federal evidence rules on presumptions. The bottom line in the law; like any other activity: is there a better approach. It is petitioner's contention that the *Wood case* concept — is the better approach.

The current Arkansas concept has at least two major negatives, it affords no honest protection; and it rewards those who abuse, oppress, or otherwise unduly influence for economic gain.

Conclusion:

That the relief asked for should be granted, in that it gives substance and meaning to a positive social and ethical policy attitude; and refuses to reward mis-deed, however it may be "packaged".

POINT II

THE ISSUE: NEED FOR A POLICY STATEMENT BY THIS COURT, AS TO BASIC ROLE AND FUNCTION OF THE DISCOVERY PROCESS; AND THE DEFINITION OF A CONTROL AND SUPERVISION STANDARD, WHICH WILL ENSURE AND FACILITATE EFFECTIVE DISCOVERY.

To help determine "what happen" has always been the rational reason and argument for discovery. For only after you are reasonable certain that you know "what happen" can you begin to deal with the "what are we going to do about it" issue. Discovery rules and procedures being a major attempt to preclude "fun and games" type trials.

For somewhere the "what happen" must be determined; this is discovery's role and function. For only with a reasonably honest or valid "what happen"; can it be argued that the judiciary is doing anything of benefit to society.

Thus the argument is made: that maybe it is time that "truth" be afforded the same status as civil rights, voter rights and rights to a valid education opportunity. For until truth or "what happen" is known; the judiciary does not know what it is adjudicating.

The discovery in this case manifested many of the problem situations and attitudes discussed in the Chicago study (Wayne D. Brazil, Views from the Front Lines; Observations by Chicago Lawyers About the System of Civil Discovery, 1980 A.B.F. Res. J. 217 and *id.*, Civil Discovery; Lawyers Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 A.B.F.

Res. J. 787). Additionally, no response was ever filed on time.

There is general agrement that "Discovery" is a problem package; and somewhat like this nation's budget deficits and ever increasing national debt; there is much discussion, but little meaningful action, where action can be taken.

That is, what the discovery fact situation it this case manifests — "deficits"; it is not unique in any sense; but it is a problem. Just like a "segregated school" is segregated; whether it is located in rural Mississippi or Topeka, Kansas What is presented in this case is a series of ills and mis-deeds; and just like the Topeka, Kansas schools in the early 1950's were not the worst segregated schools in the nation — neither is this the worst discovery case. But lack of "worst" status, did not preclude this Court taking action as to the Topeka sitaution.

Nor is there a shortage of discussion of fact situations and ensuing problem situations as to discovery; the Chicago study (supra) affords a good composite analysis. And just like *Brown* (347 U.S. 483) did not solve school segregation; all that is being asked: is that this Court deal; and handle the discovery issue and problem in the same manner and with the same approach that *Brown* handled segregated schools.

That is, what currently goes for discovery (approach, procedure, and attitude) is neither viable nor defensible; and that the time for change has arrived. Thus a need for a *"Brown"* approach and attitude to the discovery problem; the fact situation of this case being the Topeka School Board.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted; that the judgment below should be reversed in its entirety; and that the full relief that has been asked for below, be granted.

Respectfully submitted,

William P. Walters*
Walters Law Firm, P.A.
#18 Town Square
P. O. Box 280
Greenwood, Arkansas 72936
(501) 996-2122

Attorneys for Petitioner
**Counsel of Record*

APPENDIX

APPENDIX A

DIVISION II
ARKANSAS COURT OF APPEALS
No. CA 85-217

CARL WIDMER APPELLANT	Opinion Deliverey February 26, 1986
VS.	AN APPEAL FROM SEBASTIAN COUNTY PROBATE COURT, NO. P-83-272 FORT SMITH DISTRICT
RAYMOND F. WIDMER, EXECUTOR OF THE ESTATE OF WALTER WIDMER, DECEASED APPELLEE	HONORABLE WARREN O. KIMBROUGH PROBATE JUDGE
	AFFIRMED

James R. Cooper, Judge

In the probate court below, the appellant, Carl Widmer, objected to the admission of his father's will, claiming that it was not freely executed by his father because of the undue influence of the appellee, Raymond Widmer, the appellant's brother. The probate judge held that there was insufficient evidence presented to support the appellant's claim and ordered the will admitted to probate. From that ruling the appellant brings this appeal.

At the request of his father, Walter Widmer, the appellee, Raymond Widmer, accompanied his father to an attorney's office in August, 1975, for an initial consultation with Walter Widmer's attorney as to how

he wanted his property distributed at the time of his death. Walter Widmer instructed the attorney to draft a will naming the appellee executor and trustee of a trust to be created for Walter Widmer's only grandchildren. The will further provided that the remainder of the estate, after provision for the trust, was to be divided equally between the appellee and the appellant. Subsequently, the will was prepared and Walter Widmer returned to the attorney's office alone on September 4, 1975, and executed his will in the presence of three disinterested witnesses. These three individuals testified at the trial that, at the time of the execution of the will, the testator appeared to fully understand what he was signing and did not give any indication that he was under pressure of any sort to sign the will. They stated that, although elderly, he appeared to be mentally alert, that he seemed to have full command of his facilities, and that he appeared to be signing the will of his own free accord.

The appellant's proof to support his allegation of undue influence consisted solely of the cross-examination of the three individuals who witnessed the will. Their testimony as to the competency of the testator did not vary nor did their testimony concerning their opinions that he executed the document of his own free will. The probate judge found that the will was properly executed by a competent testator and was valid. He therefore admitted the will to probate and appointed the appellee executor of the estate pursuant to the provisions contained in the will.

The burden of proving mental incompetency, undue influence and fraud which will defeat a will is upon

the party contesting it. *Sullivant v. Sullivant,* 236 Ark. 95, 364 S.W.2d 665 (1963). A party challenging the validity of a will is required to prove by a preponderance of the evidence that the testator lacked the mental capacity or was unduly influenced at the time the will was executed. *Oliver v. Griffe,* 8 Ark. App. 152, 649 S.W.2d 192 (1983).

The probate judge below found that the appellant had failed to meet his burden of proof to support his allegation that the will was not freely executed and that based upon the evidence presented, the will should be declared valid and admitted to probate. We review probate proceedings *de novo* on the record, but it is well settled that the decision of a probate judge will not be disturbed unless clearly erroneous; and we give due regard to the opportunity and superior position of the trial judge to judge the credibility of the witnesses. ARCP Rule 52(a); *In re Titsworth,* 11 Ark. App. 197, 669 S.W.2d 8 (1984); *Taylor v. Hill,* 10 Ark. App. 45, 661 S.W.2d 412 (1983); *Green v. Holland,* 9 Ark. App. 233, 667 S.W.2d 572 (1983).

The probate judge's findings are neither clearly erroneous nor against the preponderance of the evidence, and therefore we affirm.

AFFIRMED.

MAYFIELD and GLAZE, JJ., agree.

Office of The Clerk

Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

April 2, 1986

Walters Law Firm
#18 Town Square
P. O. Box 280
Greenwood, AR 72936

RE: CA85-217 Carl Widmer v. Raymond F. Widmer, Executor

Gentlemen:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Petition for Rehearing is denied."

Sincerely yours,
Dena L. Williams, Clerk

DLW:mf

cc: John T. Tuohey
Ruth Carmack, Clerk

Office of The Clerk

Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

April 14, 1986

Bill Walters
Attorney at Law
P. O. Box 280
Greenwood, AR 72936

Re: 86-55 Carl Widmer v. Raymond F. Widmer, Executor of the Estate of Walter Widmer, Deceased

Dear Mr. Walters:

The Court made the following order in the above styled case today:

"Petition for Review is denied. Purtle, J., not participating."

Sincerely yours,
Dona L. Williams, Clerk

DLW:rh
cc: John T. Tuohey

IN THE PROBATE COURT OF
SEBASTIAN COUNTY, ARKANSAS

IN THE MATTER OF
THE ESTATE OF
WALTER WIDMER,
DECEASED

NO. P-83-272

ORDER

On the 8th day of October, 1984 the Petition of Raymond F. Widmer was presented to the Court, by and through his attorney, John T. Tuohey and the Petition and Renewed Petition of Respondent, Carl Widmer, was presented to the Court, by and through his attorney, Bill Walters. A hearing was held relating to this matter with the Petitioner and Respondent appearing in person and represented by counsel. Based upon the pleadings and evidence presented to the Court, the Court finds as follows:

1. Walter Widmer died at Fort Smith, Sebastian County, Arkansas on or about the 26th day of September, 1983 at the age of 89.

2. The Decedent left as his Last Will and Testament a written instrument dated the 4th day of September, 1975 which was filed with the Court.

3. Due proof of the execution by the Decedent of the Last Will and Testament of the Deceased in the manner required by law was made to the Court by the testimony, at the aforementioned hearing, by all of the witnesses who subscribed such Last Will and Testament as attesting witnesses.

4. The surviving heirs of the Decedent, who share

in the assets of the Estate of the Decedent are as follows:

Name	Age	Relationship	Address	Percentage
Raymond F. Widmer	47	Son	3249 McCord No. Little Rock Arkansas 72116	42½%
Carl Widmer	53	Son	6201 Rogers Ave. Fort Smith Arkansas 72901	42½%
Rebecca Sue Widmer	21	Granddaughter	3249 McCord No. Little Rock Arkansas 72116	5%
James Andrew Widmer	14	Grandson	3429 McCord No. Little Rock Arkansas 72116	5%
Dawn Emlia Widmer	16	Granddaughter	3429 McCord No. Little Rock Arkansas 72116	5%

5. This Court has venue and jurisdiction of this Proceeding based upon the fact that the Decedent was a resident of Sebastian County at the time of his death.

6. The Last Will and Testament of Walter Widmer, Deceased, named Petitioner, Raymond F. Widmer, as Executor to serve without bond.

IT IS THEREFORE, CONSIDERED, ORDERED AND ADJUDGED, that the Last Will and Testament of Walter Widmer, dated the 4th day of September, 1975 is his last Will and Testament and is hereby admitted to Probate; that Raymond F. Widmer be appointed Executor to serve without bond, that Letters Testamentary be issued naming said Raymond F. Widmer as Executor, that Notice of this Proceeding be

published in the time and manner required by law, that said Raymond F. Widmer take charge of the assets of the Estate of the Decedent and file an Inventory of such assets with the Court as soon as possible.

Warren Kimbrough
Probate Judge

Date 17 October, 1984

RULES OF THE SUPREME COURT AND COURT OF APPEALS OF THE STATE OF ARKANSAS

★ ★ ★ ★

Rule 20.

PETITIONS FOR REHEARING

(a) Time Limited for Filing — Service. — Petitions for rehearing, briefs thereon, and evidence of service both of petition and brief, must be filed within 17 calendar days from date of decision.

★ ★ ★ ★

Rule 29.

APPELLATE JURISDICTION OF THE COURT OF APPEALS

1. All cases heretofore appealable to the Supreme Court shall, from and after July 1, 1979, be appealed to the Court of Appeals, except that the following cases shall be appealed to the Supreme Court:

★ ★ ★ ★

2. An appellant who contends that his appeal should be heard in the Supreme Court pursuant to Rule 29(1), instead of in the Court of Appeals, shall designate on his notice of appeal and designation of the record the applicable subdivision of Rule 29(1) which gives the Supreme Court jurisdiction. In addition appellant shall preface his abstract and brief with a jurisdictional statement not exceeding two pages in length.

3. The Supreme Court may transfer to the Court

of Appeals any case appealed to the Supreme Court and may transfer to the Supreme Court any case appealed to the Court of Appeals.

4. The Court of Appeals may certify any case appealed to the Supreme Court, if the Court of Appeals finds that the appealed case:

a. is excepted from its jurisdiction by section 1 hereof;

b. involves an issue of significant public interest or a legal principle of major importance.

The Supreme Court may accept for its docket cases so certified, or may remand any of them to the Court of Appeals for decision.

5. No case filed in either the Supreme Court or the Court of Appeals shall be dismissed for having been filed in the wrong court, but shall be transferred or certified to the proper court.

6. No appeal as of right shall lie from the Court of Appeals to the Supreme Court. Certiorari may be granted by the Supreme Court for review of decisions of the Court of Appeals if, but only if, the Supreme Court determines that the case (a) should have come to the Supreme Court originally under section 1 of this rule, (b) should have been certified to the Supreme Court under section 4B [4b] of this rule, or (c) was decided in the Court of Appeals by a tie vote.

Petitions for review must be in writing and must be filed within 17 calendar days from the date of the decision, regardless of whether or not a petition for rehearing is filed with the Court of Appeals. Petitions

may be typewritten and shall not exceed two legal size, double-spaced, typewritten pages in length. The petition must briefly and distinctly state the basis upon which the case should be reviewed and may include citations of authority or references to statutes or constitutional provisions. Briefs will not be accepted and oral argument will not be heard in support of petitions for review; however a party may attach to his petition for review a copy of his petition for rehearing in the Court of Appeals. Except in cases appealed to the Court of Appeals from the Workers Compensation Commission or the Employment Security Board of Review, no petition for review on the ground that the case involves an issue of significant public interest or a legal principle of major importance, as specified in subparagraph 4(b) of this Rule, will be considered unless the party petitioning for review filed in the Court of Appeals, before the submission of the case to that court, a motion asking that the case be certified to the Supreme Court on that ground, with a certificate of counsel that the motion is filed in the good faith belief that the case should be so certified.

★ ★ ★ ★

APPENDIX B

IN THE PROBATE COURT OF
SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

IN THE MATTER OF THE ESTATE OF
WALTER WIDMER, DECASED P-83-272

THE HONORABLE WARREN O. KIMBROUGH,
Probate Judge, Presiding

Order Entered: October 17, 1984

Notice of Appeal: November 6, 1984

Order Extending Time
for Filing Record to: May 6, 1985

APPEARANCES:

ATTORNEY FOR PETITIONER, RAYMOND F. WIDMER	MR. JOHN T. TUOHEY Attorney at Law Route 1, Box 42 Elkins, Arkansas 72727
ATTORNEY FOR RESPONDENT/ APPELLANT, CARL WIDMER	MR. BILL WALTERS Walters & Rush Attorneys at Law, P.A. Post Office Box 280 Greenwood, Arkansas 72936

★ ★ ★ ★

(Page 27)

IN THE PROBATE COURT OF
SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT
IN THE MATTER OF THE ESTATE
OF WALTER WIDMER, deceased
CASE NO. P-83-272

RESPONSE TO INTERROGATORIES

Comes now the Petitioner, Raymond F. Widmer, by and through his attorney, and for his response to the interrogatories propounded to him by respondent states as follows:

INTERROGATORY NO. 1: Please state who prepared the purported Will filed for probate.

RESPONSE: Robert Taylor, Attorney at Law, prepared the Last Will and Testament of the deceased, Walter Widmer.

★ ★ ★ ★

INTERROGATORY NO. 3: If the decedent was present when instructions were given for the preparation of the Will, please state who was with the decedent at that time.

RESPONSE: Robert Taylor and Raymond F. Widmer.

INTERROGATORY NO. 4: Please state the physical location of the giving of instructions for the preparation of this Will.

RESPONSE: Warner Law Firm, Attorneys at Law, 214 North 6th Street, Fort Smith, Arkansas.

★ ★ ★ ★

(Page 29)

INTERROGATORY NO. 13: Where were you on the date instructions were given for the preparation of the Will?

RESPONSE: In attendance at the conference between Walter Widmer and Robert Taylor on August 14, 1975.

★ ★ ★ ★

(Page 30)

INTERROGATORY NO. 19: When did you first know what the purported Will contained?

RESPONSE: August 14, 1975 Raymond F. Widmer attended the conference between Walter Widmer and Robert Taylor at which the provisions of the Will were discussed. Raymond F. Widmer received an unexecuted copy of the Will. The executed Will was read on October 4, 1983 in the law office of Robert Taylor.

★ ★ ★ ★

(Verification and Certificate of service omitted in printing.)

★ ★ ★ ★

(Page 48)

IN THE PROBATE COURT OF
SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

IN THE MATTER OF THE ESTATE
OF WALTER WIDMER, deceased No. P-83-272

RESPONSE TO INTERROGATORIES

Comes now the Petitioner, Raymond F. Widmer, by and through his attorney, John T. Tuohey, and for his Response to Interrogatories of Respondent propounded on February 3, 1984, states as follows:

★ ★ ★ ★

(Page 49)

INTERROGATORY NO. 12: In earlier interrogatories you indicated that you accompanied Walter Widmer to the Warner Law Firm on August 14, 1975. Will you please state who provided transportation for Walter Widmer to the Warner Law Firm on that day?

RESPONSE: To the best of my recollection, Walter Widmer drove his own car to the law office of Robert Taylor and Raymond Widmer was a passenger.

★ ★ ★ ★

(Page 50)

INTERROGATORY NO. 13: Please state all other persons, beside yourself, who received an unexecuted copy of the Will in question. Also please indicate the date you received the unexecuted copy of

the Will and the location to which the unexecuted copy of the Will was delivered to you.

RESPONSE: A draft Will was mailed to Walter Widmer on August 21, 1975 with a copy mailed to Raymond F. Widmer. The date of actual receipt was not recorded.

★ ★ ★ ★

(Verification and Certificate of service omitted in printing.)

★ ★ ★ ★

(Page 78)

IN THE PROBATE COURT OF
SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

IN THE MATTER OF THE ESTATE
OF WALTER WIDMER, DECEASED

No. P-83-272

RESPONSE TO INTERROGATORIES

Comes now the Petitioner, Raymond F. Widmer, by and through his attorney, John T. Tuohey, and for his Response to Interrogatories of Respondent propounded on April 30, 2984 (sic), states as follows:

★ ★ ★ ★

(Page 79)

INTERROGATORY NO. 7: Please list any differences or variations between your "unexecuted copy of the Will" and the executed will signed September 4, 1975.

RESPONSE: There appear to be none.

INTERROGATORY NO. 8: Please state any contact that Walter Widmer had with Robert Taylor prior to August 14, 1974.

RESPONSE: I have no personal knowledge of any contact.

★ ★ ★ ★

(Verification and Certificate of service omitted in printing)

★ ★ ★ ★

(Page 154)

IN THE PROBATE COURT OF
SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

IN THE MATTER OF THE ESTATE OF
WALTER WIDMER, DECEASED

P-83-272

EVIDENCE ADDUCED BEFORE THE
HONORABLE WARREN O. KIMBROUGH,
PROBATE JUDGE

"A Consideration of Petition to Admit Decedent's Will to Probate, Objections Thereto, and Petitions for other Relief."

OCTOBER 8, 1984

APPEARANCES:

ATTORNEY FOR PETITIONER, RAYMOND F. WIDMER:	MR. JOHN T. TUOHEY Attorney at Law Route 1, Box 42 Elkins, Arkansas 72727
ATTORNEY FOR RESPONDENT, CARL WIDMER:	MR. BILL WALTERS Walters & Rush Attorneys at Law, P.A. Post Office Box 280 Greenwood, Arkansas 72936

★ ★ ★ ★

(Page 208)

RAYMOND WIDMER, after having been duly sworn testified for petitioner as follows:

DIRECT EXAMINATION

BY MR. TUOHEY:

Q. Mr. Widmer would you state your full name and address please?

A. My name is Raymond F. Widmer, I live at 3429 McCord Drive, North Little Rock, Arkansas.

Q. Are you the petitioner in this case?

A. I am.

Q. And you have a relationship to the decedent, is that correct?

A. He was my father.

★ ★ ★ ★

(Page 212)

Q. All right, sir. Now that you have identified that document let's relate back if we can to 1975, August of 1975. Would you relate to the Court any circumstances that occurred in August of 1975 relating to the preparation and/or execution of that document?

A. Yes, I accompanied my father to Robert Taylor's office on August 14, 1975, where he conferred, we conferred with Robert Taylor on the preparation of the will.

Q. Did you make the appointment with Robert Taylor for your father?

A. That's my recollection. Several days prior

(Page 213)

to that meeting on the 14th I called the Warner firm and then I believe I spoke either with his secretary, I thought I spoke with Mr. Taylor then. I had been acquainted with the Warner firm previously.

Q. All right, sir, how did you become acquainted with the Warner firm?

A. I had a boundary dispute or a land dispute in Crawford County in 1973 and you had advised me or you had referred me to the Warner firm I believe, because you knew Randy Warner.

Q. That's correct. How long have I been handling legal matters for you Ray?

A. Probably since '71 or '72.

Q. All right, so if you had an attorney, it would be myself, is that correct?

A. You are my attorney, yes.

★ ★ ★ ★

(Page 214)

Q. All right, what happened next?

A. My dad and I, or I came to Fort Smith and accompanied my dad to the Warner law firm and had a conference with Robert Taylor.

Q. Had you called Mr. Taylor on the phone and set the appointment up with him prior to that?

A. I recall calling the Warner law firm and my recollection is that I probably did speak with Mr. Taylor.

★ ★ ★ ★

(Page 216)

Q. Now let me ask you a few questions about that conference. Who was present, who was there in the room?

A. Robert Taylor, the attorney, and my father, Walter Widmer and myself.

Q. Do you have any recollection of approximately how long this conference lasted?

A. Approximately an hour.

★ ★ ★ ★

APPENDIX C

(NOTE: When Probate Court Record was filed with the Arkansas Supreme Court this matter was given Supreme Court Appeal No. 85-88. Later after Appellant's Abstract and Brief were filed, the Arkansas Supreme Court ransferred it to the Arkansas Court of Appeals; it was then given Appeal No. CA 85-217 (see letter, this Appendix, infra, p. 28c).

When this occurred, Carl Widmer (petitioner, this Court) filed a Motion To Certify Appeal To Arkansas Supreme Court, July 3, 1985 (this Appendix, infra, p. 29c). A Motion with similar thoughts and argument was also filed with the Arkansas Supreme Court asking it to accept; neither Court transferred, and matter was decided by Arkansas Court of Appeals on February 26, 1986).

IN THE SUPREME COURT OF THE STATE OF ARKANSAS

CARL WIDMER ..... *Appellant*

vs. NO. 85-88

RAYMOND WIDMER ..... *Appellee*

MOTION FOR ENLARGEMENT OF BRIEF

Comes now the Appellant, Carl Widmer, and for his motion for enlargement of brief, states:

I.

That the Arkansas Rules of Appellate Procedure provide that argument on points for reversal in the appellant's brief shall not exceed 25 typewritten pages.

That because of the complex issues involved in this matter and because of the complexity of the law on the issues, Appellant anticipates a need for forty pages of argument on the points relied upon for reversal.

WHEREFORE, Appellant prays that this Court authorize an additional 15 pages of argument be allowed in the Appellant's brief.

CARL WIDMER, *Appellee*
WALTERS LAW FIRM, P.A.
Post Office Box 280
Greenwood, Arkansas 72936

By Bill Walters

CERTIFICATE OF SERVICE

I, Bill Walters, attorney for Appellant, Carl Widmer, hereby certify that I have served a true and correct copy of the above and foregoing Motion for Enlargement of Brief upon Appellee by mailing said copy to his attorney of record, Mr. John T. Tuohey, 311 Arlington, Redwood City, California 94062, this 3rd day of May, 1985.

Bill Walters

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

May 28, 1985

Bill Walters
Attorney at Law
P. O. Box 280
Greenwood, AR 72936

Re: 85-88 Carl Widmer vs. Raymond Widmer
Dear Mr. Walters:

The Court made the following order in the above styled case today:

"Appellant's motion for enlargement of brief is denied."

Sincerely yours,
Dona L. Williams, Clerk

DLW:rh
cc: John T. Tuohey

IN THE COURT OF APPEALS OF THE STATE OF ARKANSAS

CARL WIDMER ..... *Appellant*

v. NO. CA85-217

RAYMOND F. WIDMER, EXECUTOR OF THE ESTATE OF WALTER WIDMER, DECEASED ..... *Appellee*

ABSTRACT AND BRIEF FOR APPELLANT

ARGUMENT

I.

THE COURT ERRED IN FAILING TO GRANT ALL RELIEF PRAYED FOR IN RESPONDENT'S AMENDED PLEADING, MANDATORY INFERENCE OF UNDUE INFLUENCE NEVER REBUTTED BY THE APPELLEE AND BECAUSE OF THE NATURE OF HIS TOTAL CONDUCT

The term, "mandatory inference" is the word choice of the Supreme Court of Michigan. In *re Wood's Estate,* 374 Mich. 278, 132 N.W. 2d 35, 42, 5 ALR3d 1, 11 (1965).

(A) THE MANDATORY INFERENCE OF A PRESUMPTION OF UNDUE INFLUENCE WAS NEVER REBUTTED BY THE APPELLEE.

> "The rule is inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself or deal with the other upon terms of his own making; that in every such transaction between persons standing in that relation the law will presume that

he who held an influence over the other exercised it unduly to his own advantage; . . . the inequality between the transacting parties is so great that, without (any) proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will imput an exercise of undue influence; that the transaction will not be upheld unless it shall be shown that such other had independent advice . . .

It has been more frequently applied to transactions between attorney and client or guardian and ward than to any other relation between the parties, but the rule itself has its source in principles which underlie and govern all confidential relationships and is to be applied to all transactions arising out of any relation in which the principle is applicable. . .

Presumptions in the law are almost invariably crystallized inferences of fact. Experience has taught that if certain evidentiary facts be established, there is such a strong practical likelihood that another stated fact will be true that the fact may be presumed." *In re Wood's Estate,* 374 Mich. 278, 132 N.W.2d 35, 41-43, 5ALR3d 1, 10, 11 (1965)

"Rejecting a contention that the presumption of undue influence disappeared when met by substantial evidence, said that the true rule was that the presumption with its underlying fact and inferences never does or can disappeared from the case but raises an issue for the finder of facts." *In Re Patterson's Estate,* 383 S.W. 2d 735 (1964, Mo.) As summarized on p. 80 of 5ALR3d.

"A presumption which shifts the burden of persuasion does not vanish from the case upon a prima facie showing but remains throughout the case to require the fact finder to decide such issue of fact

against the party having such burden unless he is convinced by the required degree of proof or measure of persuasion that the facts on that issue are contrary to such presumption. So, in this case, since we hold that this presumption shifts the burden of persuasion that there was no fraud or undue influence onto the proponents of the will, the fact finder must find that issue against them unless he was convinced from the evidence that there was no fraud or undue influence." *In Re Swan's* Estate, 4 Utah 2d 277, 293 P.2d 682, 689 (1956)

"For reasons of policy the law has seen fit to clothe such an inference with the authority of a presumption in order to determine the result when no evidence to the contrary is introduced. However, there is no perceivable reason grounded on policy or logic why the inference should not continue after some evidence has come into the case which tends to rebut the presumption. Basing a finding of fact on an inference is nothing more than grounding such a finding on circumstantial evidence." *Schlichting v. Schlichting,* 15 Wis. 2d 147, 112 N.W. 2d 149,155 (1961)

After much discussion and evalution of *In re Wood's Estate,* (supra), the Michigan Supreme Court concluded with these thoughts:

"If the trier of fact finds the evidence by the Defendant as rebuttal to be equally opposed by the presumption, then the Defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the "mandatory inference" remains unscathed. This does not mean that the ultimate burden of proof has shifted from Plaintiff to Defendant, but rather that Plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive

evidence, and that the Plaintiff will always satisfy the burden of persuasion when the Defendant fails to offer sufficient rebuttal evidence." *Kar v. Hogan,* 399 Mich. 529, 251 N.W.2d 77, 81 (1976).

The Appellant believes that in the interest of fairness and justice and in the interest of establishing a public policy to achieve a fair and just result that the theory in the *Wood's Estate* case should be adopted. The strongest argument for the *Wood's Estate* case approach to undue influence issue is that the person who presents the appearance of influence should bear the burden of proving the lack of influence or the lack of impropriety. The argument, of course, is that they alone have total knowledge and if they elected to risk the appearance of impropriety, then they should be forced to carry the burden of proving the honesty or propriety of the influence or that no such influence existed and that the person purportedly influenced was in truth and in fact acting as a completely free agent and that if legal counsel is involved that the person who may have been influenced had full access to effective independent legal advice, which legal advice was uncontrolled or unplanned by those who are charged with undue influence. *In re Wood's Estate,* 374 Mich. 278, 132 N.W.2d 35, 41-43, 5ALR3d 1, 10, 11 (1965)

Even the presence of honest and effective independent legal advice does not necessarily remove the action or reaction of undue influence; and numerable cases can be cited in which no contention of lack of independent legal advice was presented or suggested yet the court found that undue influence was exercised.

In summary, the mandatory inference of a presumption of undue influence established by the evi-

dence has not been effectively rebutted by the Appellee. In fact Appellee's testimony reinforces the argument that a very definite inference of undue influence existed. This, in conjunction with the father/son confidential relationship and financial advisor, point squarely to the conclusion that the Appellee, failing to negate the presumption of undue influence, is presumed to have exercised undue influence.

1. THE COURT ERRED IN NOT FINDING THAT A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN WALTER WIDMER AND HIS SON RAYMOND WIDMER.

> "A confidential relationship is presumed between parent and child, attorney and client, and trustee and cestui que trust. B*lodgett v. Martsch,* Utah. 590 P.2d 198 (1978) . . . Where a confidential relationship exists, a presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the defendant to prove absence of unfairness by a preponderance of the evidence. . . (finding of undue influence in execution of trust shifted burden to defendant to prove absence of undue influence in a subsequent alleged ratification of the trust) ; *Baker v. Pattee,* 684 P. 2d 632, 636 (Utah 1984)

Also fully in accord with "parent and child" as being a confidential relationship are 25 Am Jur 2d, Duress and Undue Influence Sec. 44 and 15A C.J.S. Confidential p. 352.

> ". . . After a very extended reading of the cases, the writer feels justified in saying that in all of them the confidential relation of the beneficiary to the benefactor is a most important element of the inquiry and in none of them is it regarded as less than a circumstance of suspicion requiring

explanation." *Yardley v. Cuthbertson,* 108 Pa. St. 395 A. 765, 781)1885)

By definition, the confidential relationship issue exists in this case because of the relationship of parent and child, between the decedent and the Appellee. Additionally, in this case the "confidential relationship" argument is substantially evidenced by Appellees's admitted control and involvement in drafting the Will, plus his advisory relationship with the decedent, his father.

2. TOTAL LACK OF EFFECTIVE INDEPENDENT LEGAL ADVICE (COUNSEL).

"When the legal presumption of undue influence has arisen by showing confidential relations, whether in dispositions of property inter vivos or by Will, the burden of proof is upon the party seeking to take the benefit of such disposition to rebut the presumption attaching thereto by showing either a severance of the confidential relations, or that the party making the disposition had competent and independent advice in regard thereto. . . Independent advice has been held to mean the testator had the benefit of conferring fully and privately about the consequences of his intended will with a person who was not only competent on such matters but who was so disassociated from the interest of the beneficiary named there as to be in a position to advise with the testator impartially and confidentially." *White v. Palmer,* Okl. 498 P. 2d 1401, 1406 (1972).

Proper "independent advise" means that the donor has the preliminary benefit of conferring fully and privately, upon the subject of his intended gift, with a person who is not only competent to inform him correctly of its legal effect,

but who is, furthermore, so disassociated from the interests of the donee, as to be in a position to advise with the donor impartially and confidentially as to consequences to the donor of his proposed benefaction." *Soper v. Cisco,* 85 NJ Eq 165, 95 A 1016; 59 Am Jur 2d P. 246.

"Burden of Showing Good Faith. If the beneficiary of the will is the proponent and occupies a confidential relationship with the testator, the burden of proof is on the proponent to establish affirmative regularity of conduct and good faith on his part in connection with the execution of the Will. *In re Brindle's Estate,* 60 A.2d 1, 360 Pa. 53; 94 C.J.S. Wills sec. 1091 note 91.

"The fact that the lawyer who drafted the will and the witnesses to its execution observed no undue influence is not conclusive as to the absence of undue influence. . . Proof of Formal Execution. Under conditions giving rise to a presumption against the validity of the will mere formal proof of the execution is insufficient to show the absence of undue influence." 94 C.J.S. Wills sec. 261.

As to the independent legal advice argument, in this case there is even less of an independent legal advice argument than in the *Wood's Estate* case. Appellee, by his own statements acknowledges his contact with the Warner Law Firm and acknowledges that he made the appointment to take his father to the Warner Firm where the Will provisions were discussed and finalized. Appellee freely acknowledges that he participated in the drafting of the Will and that certain provisions were included in the Will, specifically at his request. He further acknowledged that the Will admitted to probate does not differ from the draft of the Will which was sent to Appellee, and which he ap-

proved. Appellee acknowledges that he was in contact with the decedent the weekend before the execution of the Will and we have only the Appellee's own statement that he was not in Fort Smith the day the purported Will was executed.

The witnesses to the Will were not aware as to how the decedent got to the lawyers office on the day the Will was executed. This, coupled with the fact that the Will was not given to the decedent, Walter Widmer, on the day he signed it, in view of the fact that the attorney said this was unusual, certainly gives strength and support to the overall allegation of undue influence. Again the Appellee never negated this argument and in fact his testimony reinforces the argument.

The argument that the decedent had an opportunity to revoke the Will is without basis in this case. The testator did not have physical possession of the Will. The decedent, an immigrant to this country, was unaware of the legal proceedings as is evidenced by his reliance on his son, Raymond F. Widner, for advice concerning legal matters and it is obvious that he would not have known that he could, by the execution of a new Will, revoke the Will in existence. In addition, the presence of undue influence was not one that subsided but continued. The decedent continuously fully experienced the emotional trauma created by the appointment, drafting and the execution of the purported Will dated September 4, 1975.

The decedent could have sought other legal counsel were it not for the fact that he was a man of aged years, an immigrant, and a person without any legal knowledge. This, coupled with the fact that the only attorney

that he knew had died, would clearly lead a person to the conclusion that coupled with the undue influence it would be difficult, if not impossible for the decedent to have pursued this matter by contacting other independent legal counsel.

The evidence in this case, presented by the witnesses for the Petitioner, clearly establishes that the decedent in this case had neither effective or independent legal counsel. The Appellee chose the attorney and provided major imput as to the drafting of the Will, which input was freely accepted by the attorney. Therefore, the attorney was not acting independently for the benefit of the decedent nor was the counsel effective in providing totally independent legal advice.

To argue that the decedent had independent legal advice would demand a complete abandonment of the legal concept as understood by the lay public's concept of the term. There is no evidence that Robert Taylor was not acting solely for the benefit of the Appellee, Raymond F. Widmer.

In light of the fact that Robert Taylor failed to perceive the warning signals of undue influence, as clearly stated in Am Jur 2nd and C.J.S.; it is concluded that he would be unable to determine the presence or lack of presence of undue influence, a situation that existed before him.

B. McCULLOCH v. CAMPBELL CONCEPT OF UNDUE INFLUENCE LACKS SUPPORT IN REALITY OR LAW.

It would appear that the Arkansas Supreme Court failed to look at the note on the subject of undue in-

fluence following the *Kimball v. Cuddy* case, Ill. 7 N.E. Rep. 589, 599 (May 5, 1886); for a brief reading of this material would not afford the support contended for the observations contained in *McCulloch v. Campbell,* 49 Ark. 367, 5 S.W. 590 (1887) on undue influence. Additionally, the Illinois court which rendered the *Rutherford v. Morris,* 77 Ill. 397; also seems to have failed to have read those cases that existed at that time.

Nor would it appear that either of the courts engaged in any meaningful reading of the material contained in Redfield on the subject of undue influence, for the total consensus of the Redfield material does not afford the support the quoted material implies, as the following quote illustrates:

> "It is obvious, in practice, that by far the largest proportion of Wills, procured by undue influence, is brought about by flattery and affected devotion; and that comparatively a very small number are induced, either by force, or actual menace. It is well known, that in extreme old age, the nervous system, not unfrequently, becomes more than ordinarily sensible of intimidation. So that many persons, who, in middle life, were resolute and firm, and not easily excited by dread, or apprehension of evil, become timid and fearful, like feeble women, or children, and are in constant dread of injury, or loss of comfort, from those in whom they have formerly reposed the utmost confidence. . . For every one must be aware, that in all such inquiries the real question will always be, not so much what was the foundation of the testator's apprehensions of evil, as to what extent did his belief in the imminent danger of such perils, deprive him of the exercise of his free will, in the act of making his testament." Swinburne as quoted

by Redfield p. 477, 478, I Redfield on Wills (3rd Ed.) (1869). Note: Photocopy of these pages contained in appendix.

The Illinois Supreme Court up to the early 1930's had not seen fit to state it did not recognize the concept of "undue influence"; but the observation of an Illinois Trial Chancellor as quoted by a Law Review article author (2 U. Chi. L. Rev. 457, 463 (1935) on undue influence in Illinois would strongly imply that the Court would have been more intellectually honest with society and the legal profession if they had so stated. The thought being: ". . that in a Will contest, contestants could offer no evidence on the subject of undue influence but what proponents would be able to cite Illinois cases to the effect that the evidence was inadmissible."

C. POLICY ARGUMENT ASPECTS.

"Undue influence is generally difficult of direct proof. It is generally exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insiduous effect must be determined from facts and circumstances surrounding the testator, his physical and mental condition as shown by the evidence and the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes." *Hyatt v. Whorten,* 43 S.W. 2d 726, 728 (Ark. 1931)

"Wills-Posthumous Continuation of Undue Influence. In a Will contest, caveators offered evidence of undue influence alleged to have been exerted by testator's wife, and proponents objected on the ground that the contest codicils were executed eight days and ninety-eight days respectively

after her death. Held in contemplation of law, undue influence does not necessarily cease with the death of the person alleged to have exercised it. Judgment for caveators sustained.

It is well established that influence alleged to be undue need not be physical force but may be, and in fact, more often is some more subtle power which operates only on the mind of the testator. No overt acts of any kind need be exercised at the exact time of the execution of the Will nor is there any fixed time limit as to the admissibility of acts committed previously. . . The person alleged to have exerted undue influence need not have been present at the execution of the Will nor need he have had a beneficial interest thereunder and since neither the time element nor the manner of exerting influence would bar a contestant from alleging the undue influence of one living at the time but removed from the scene of the making of the Will, the only problem left in distinguishing between the influence of a deceased person and one merely absent, seems to be in the matter of proof of its continued operation on the mind of the testator." 13 N.C. L. Rev. 268, 269 (1935)

"What happened at the time of execution of Will is not controlling as the status of undue influence by its very nature, usually is the result of accumulating forces and it can be shown only by circumstantial evidence." 94 C.J.S. Wills, p. 1140, note 83.

"Where parties have it in their power to explain suspicious circumstances connected with a transaction, the court trying the case may regard their failure to do so as a proper subject for comment and regard their failure to produce evidence within their power as a circumstance against them. . .

"This is in application of Lord Mansfields maxim that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." *Smith v. Wheat,* 35 S.W. 2d 335, 336 (Ark. 1931).

"But the proof of such undue influence may be made, not only by direct and positive testimony, but by facts and circumstances from which such undue influence may be reasonably inferred. And this proof is permitted to take a very wide range. There must be free agency on the part of the testator, but in order that there may be such free agency, there must be a state of mind on his part free to act; and if, therefore, he is restrained or coerced unduly by the relation he bears to or the influence exercised by one over him in the execution of the Will, his free agency is to that extent destroyed. For this reason, it is competent, in order to determine the capacity of the testator and his free action at the time the Will is made, to inquire into all the facts and circumstances, whether before or after the time of the making of the Will, in order to enable the jury to determine probable state of his mind, and the extent and effect of the alleged influence at the time the will is executed as is said in the case of *Tobin v. Jenkins,* 29 Ark. 151: "As regards undue restraint, it may be proper to remark that it is not necessary that the mind shall act under influences at the time brought to bear or then employed, but they may be such as have at a previous time been so fixed and impressed as to retain their controlling influence at the time the act is done." *Alford v. Johnson,* 146 S.W. 516, 519 (Ark. 1912)

"All that can be said in the way of formulating a general rule on this subject is, that whatever

destroys free agency, and constrains the person whose act is brought in judgment to do what is against his will and what he would not have done if left to himself, is undue influence, no matter by what means the control is exercised, whether the control is exercised by physical force, duress, fraud, threats, importunity, or any other species of mental, moral or physical coercion. The means employed, the extent or degree of the influence, or by whom the influence is exerted, is immaterial, for the test always is, was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another rather than the expression of the will and mind of the actor...

"Undue influence exercised by any one, whether he or another gains by its exercise, renders the Will or other instrument thus procured -worthless". *Gidley v. Gidley,* 265 N.W. 245, 250 (Neb. 1936).

"Once undue influence, however, exerted, is established, a proferred Will may not be admitted to probate even though the named beneficiaries are innocent of any wrongdoing, for such an instrument cannot thereafter be regarded as a free and voluntary declaration of the testator's intentions." *In re Estate of Peterson,* 168 N.W. 2d 502, 504 (Minn. 1969)

"There is another matter to be borne in mind. The presumption of undue influence is of that class of presumptions by which a litigant (here the proponent) is called upon to make known facts more easily accessible to him than to his adversary. . . Therefore, where presumption of undue influence is created, the law puts upon proponent the burden of coming forward with credible evi-

dence satisfactorily explaining his conduct and stating what he knows as to the making of the Will". *In re Baker's Will,* 173 A.2d 422 429, (N.J. 1961)

"Fraud and undue influence in this connection mean whatever destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammelled desire." *Neill v. Brackett,* 234, Mass. 367, 126 N.E. 93, 94; *Barton v. Beck's Estate,* 195 A. 2d 63, 64, (Me. 1963)

"Where a confidential relationship exists between a testator and the beneficiary, slight evidence is sufficient to set aside a Will on the ground of undue influence. . . Where undue influence or fraud brings about the execution of a Will the whole Will is void, even though such fraud is perpetrated by only one of the beneficiaries. *Estate of Allen,* supra; *Coghill v. Kennedy,* 119 Ala. 641, 24 So. 459 *In re Rosenberg's Estate,* 246 P. 2d 858, 863, 864 (Or 1952)

"In *Greenwood v. Wilson,* 267 Ark. 68, 588 S.W. 2d 701 (1979) we held that the proponent of a Will who is a beneficiary and who drafted the Will or caused it to be drafted has the burden to prove beyond a reasonable doubt that it was not the result of undue influence and that the testator had the mental capacity to make the Will. We again held in *Smith v. Welch,* 268 Ark. 510, 597 S.W. 2d 593 (1980) that where a beneficiary procures the making of a Will it is incumbent upon those who, in such a case, seek to establish the Will to show beyond reasonable doubt that the testator had both such mental capacity, and such freedom of Will and actions as are requisite to render a Will legally valid. Uniform Rules of Evidence Rule 301 (a) speaks to presumptions and states that the party

against whom the presumption is directed has the burden of proving the non existence of the presumed fact is more probable than its existence." *Park v. George,* 282 Ark. 194, 667 S.W. 2d 644, 647 (1984)

Law that only begins to deal with concepts and issues that were fully discussed and stressed nearly 400 years ago, by Swinburne, can hardly be called novel.

Nor are these concepts and arguments without precedence in Arkansas, (except for the continued deference back to *McCulloch v. Campbell*) and the later cases which manifest this reference back; Arkansas case law fully supports and is in accord with these concepts. Arkansas cases have also stated thoughts and concepts in accord with Michigan's *In re Wood's Estate* case.

Nor was any honest credible rebutting evidence offered, the only evidence being the testimony of Robert Taylor and the other Will execution witnesses and if an honest appreciate of the realties of life is acknowledged; this testimony assumes at least quasi-selfserving or self-defending status. The self-defending status particularly as to Robert Taylor's testimony.

Appellee's testimony must also carry the burden of negating the self-serving declaration burden, which it at no time did. For his testimony almost totally supported Appellant's contentions and arguments and at no time did it in any meaningful manner negate Appellat's contentions or arguments as set out in Appellant's Amended Response and the "total presumption

package'' that existed at the beginning of the hearing on October 8, 1984.

And if argument or thought be given to the fact that Appellant called no witnesses; it must be remembered that Appellee is the sole individual (living or otherwise) who has near full knowledge of all that did occur and he the full opportunity to express his thoughts both through discovery and at the hearing; additionally those persons who were present during drafting or execution were called as witnesses.

Nor can Appellee even meet the rules or concepts set out in *McCulloch v. Campbell,* (supra) for by his own statements of what occurred and what he did not do (no gifts and lack of involvement in the care, concern or welfare, to the extent that Appellee could not state positively how his father was cared for), Thus Appellee totally fails the "useful, dutiful and affectionate'' test of *McCulloch.*

As to Appellant's concern and involvement for testator's well-being and care this was fully established through discovery by admissions of fact and answers to interrogatories.

And if argument be made that Appellee's total activity constitutes mere solicitation; it must be remembered that the stated reason for the presumption is that it is based on: "Experience has taught that if certain evidentiary facts be established, there is such a strong practical likelihood that another stated fact will be true that that fact may be presumed.'' *In Re Wood's Estate,* as quoted (supra).

It must always be remembered that all statements

as to what did occur are solely Appellee's, except for Appellant's responses to interrogatories which totally negate Appellee's basic contentions.

That a person charged with undue influence and a confidential relationship presumption cannot find non-interested third parties to support claim of affection, concern, and interest in the well-being of a person; to negate or at least lessen the undue influence argument should cause doubt as to the validity of the contention or other contentions of like nature.

Affection, concern, and involvement for a person's well-being are not "state secrets" unknown to the world, in normal real world situations; that is, non-interested third parties are normally more than fully aware of honest concern and interest; and failure to produce such witnesses is almost absolute proof of their non-existence and in like manner of honest concern, affection and involvement.

Appellee by his own admissions and answers acknowledges that it was Carl Widmer (Appellant) who cared for testator when he was ill, cut his grass and was called by testator when emergencies arose; although at times somewhat grudgingly with his "presumably" preface.

There is no negating the argument that Appellee "procured" the Will at issue; that procurement argument was fully supported by discovery, and Appellee's own testimony at the hearing only reinforced the argument and in no manner negated the argument.

"Undue influence is ordinarily not exercised in

public view. It is only rarely that direct evidence of its operation is available." 169 NW 2d 837, 843 Iowa.

Appellee displayed an attitude throughout the time at issue of little regard for proper Will process or probate system in general. The attitude displayed by the Appellee is certainly inducive of the argument that Appellee would in secret do that which is at issue in this case.

STRESS EXPLOITATION

> "Where an alleged testator is shown by evidence to be weak in mind, whether arising from age, bodily infirmity, great sorrow, or other cause tending to produce such weakness, though not sufficient to create testamentary incapacity, and the person whose advice has been sought and taken, receives a large benefit under the instrument propounded as a Will, it must be shown affirmatively that the alleged testator had full understanding of the nature of the disposition contained in it. *Cuthbertson's Appeal,* 97 Penn St. 163 (1881).

The "great sorrow" in *Cuthbertson's Appeal,* being the result of the death of testator's wife and the earlier deaths of children and others. Robert L. Sadoff, M.D., in his text *Forensic Psychiatry* (1975), in discussing stress states:

> "There are a number of other mechanisms of defense besides regression that an individual utilizes while under pressure, stress or trauma. Some of these are (1) repression: a person may push the trauma down into the unconscious, thereby forgetting or showing "amnesia" for an event. (2) Compensation: an individual may overcompensate

for his feelings of inadequacy by being or appearing "supernormal."

In this case testator had experienced the stress or trauma of several deaths, the most recent being the death of his wife and her burial on the date which would have been their 50th wedding anniversary. (February 11, 1974).

Additionally, testator had experienced the sudden death of his son, James A. Widmer (auto accident). The memories of this accident, the fact that if his son, Carl Widmer (Appellant) were killed in an accident, he would be without help except for Raymond F. Widmer (Appellee). It is this apprehension, concern, and full awareness that death can occur suddenly and without capacity of a person to prevent it in many cases, that made testator more apprehensive than a person who has not had this experience. A concern or fact that Appellee exploited to the fullest extent possible.

If the Hawaii Supreme Court in *Rodrigues v. State,* 52 Hawaii 165, 472 P. 2d 509 (1970), is willing to recognize and award money damages for mental stress caused by severe flood damage to a home, then should not the facts just stated be of greater consequence and have greater status as stress creating factors — to be given major relevance in the emotional being of a person.

Appellee's attempt to minimize the impact of this total stress situation lacks credence for at least two reasons: First, he attempted to use it to facilitate or aid in getting the Will at issue; Second, a neutral observer would say that based on his own statement

of contact with his father (testator); he had little basis on which to make stress or trauma assessments.

THUS, no tears should be shed for a person or persons who are denied participation as a consequence of their mis-deeds; for society to do otherwise would encourage and reward this type of activity.

II.

THE COURT ERRED IN FAILING TO EFFECTIVELY SUPERVISE DISCOVERY PROCESS, AS TO NON-TIMELY RESPONSES AND DENIAL OF FULL AND EFFECTIVE DISCOVERY

The probate court did not provide effective discovery support and supervision; the discovery that did occur was in spite of probate court failure to supervice and Appellee's (Petitioner's) attempt to avoid and negate discovery.

This 1829 thought on the virtue of equity discovery, is equally applicable in stating what was attempted in this case.

> "Under such circumstances the defendant cannot reasonably object to a disclosure. If he have acted with entire good faith, he can, surely, have no objection to explain his conduct. If, on the contrary, he have dealt fraudulently, it is fit that his motives should be exposed, so that justice may be administered fairly between him and the party injured. He is at all times secure from the abuse of this power of the court; for if the case is not clear, it will be even dangerous to resort to this means of making it out; and he can, at any rate, in all cases, sufficiently protect himself from harm by his own testimony, whenever he shall be called

upon to give it". 2 American Jurist 314, 329 (Oct. 1829)

The "dilatory" aspect (if it be contended) of discovery in this case was solely the result of Appellee's actions; and was an attempt to do what discovery was devised to preclude, to totally avoid disclosure of the truth (if possible) where it was primarily in the possession of the person being asked to account for his conduct.

It will be noted that even the first discovery response of Appellee (Petitioner) was not timely (Abstract p. 8); and the last discovery was basically nothing more than an attempt to determine or ascertain if indeed what Appellee had stated or failed to state in early discovery was indeed that "fact state" which he was willing to live with.

Much of the information obtained by discovery either directly or its presumption weight was very "damning"; and for this reason an attempt was made to determine if indeed what was said, was intended, or if it was the result of "poor word choice", or other like contentions — that Appellee might attempt to raise to negate its impact.

Appellant (Respondent) fully attempted to present these contentions and the need for full discovery to the probate court; (Court has both the abstracted and the total original pleadings package, including letter correspondence available for evaluation).

Nor did Appellee once see fit to file a motion for an extension of time for response to discovery, which Collier did; this after the *Collier v. Hot Springs Sav-*

ings, 272 Ark. 162, 612 S.W. 2d 730 (1981) opinion became public knowledge to the legal community.

Thus the concepts of *Collier v. Hot Springs Savings* should be fully applied, and Appellant be granted the full relief that *Collier v. Hot Springs Savings* afford.

CONCLUSION

Thus, if Appellee or his children are allowed to participate at all in this estate — he has lost nothing; and "testators to be" must continue to endure the oppression of unwanted influence and in many cases far more; for to date, the Arkansas Courts have not seen fit, in many cases, to deny reward to those who engage in this type of activity, and more importantly, facilitate its defense against challenge — and force on those who challenge it, an almost impossible task of proof.

Nor did Appellee provide any proof that testator would have made any bequest to Appellee or his children if he had been a "totally free agent", which even Arkansas law says it demands. That is testator had a total right to deny Appellee and his children total nonparticipation. Thus, in light of Appellee's acknowledged forced participation in Will drafting, and by inference Will execution. and the totally imposed conditions that Appellee's actions solely created in this case — he must be totally denied participation (if society is to be honest with itself and its elderly).

Since society and its courts are precluded from writing Wills the court must deny participation to Appellee; for the court has no proof that testator of

his own free will, would have made any provision for Appellee or his children.

Thus, Appellant for social policy reasons, ethical, moral, and failure of Appellee to prove that testator intended for him to participate at all, be granted the estate of Walter Widmer in its entirety. That Appellant be fully allowed all expenses, for these expenses would not have accrued but for Appellee's actions and deeds.

Respectfully submitted,

WALTERS LAW FIRM, P.A.
#18 Town Square
P. O. Box 280
Greenwood, Arkansas 72936

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

June 19, 1985

Walters Law Firm, P.A.
P. O. Box 280
Greenwood, AR 72936

John T. Tuohey
311 Arlington Road
Redwood City, CA 94063

RE: Carl Widmer v. Raymond F. Widmer, Executor. 85-88.

Gentlemen:

Today the Arkansas Supreme Court transferred the above styled case to the Court of Appeals for lack of jurisdiction. The Court of Appeals docket number is CA85-217 and brief times will remain the same.

Sincerely

Leslie W. Steen
Deputy Clerk

IN THE COURT OF APPEALS OF THE
STATE OF ARKANSAS

CARL WIDMER ..... *Appellant*

v. NO. CA85-217

RAYMOND F. WIDMER, EXECUTOR OF THE
ESTATE OF WALTER WIDMER,
DECEASED ..... *Appellee*

MOTION TO CERTIFY APPEAL TO SUPREME COURT

Comes now the Appellant and for his motion to certify this appear to the Supreme Court, states:

I.

This case involves an issue of significant public interest and a legal principal of major importance.

> "The history of the common law records the names of only a few truly great judges, and it is notable that all of them were men who saw their cases, even routine ones, as opportunities to examine the relation of law to the needs and practices of the society which they served. Lord Mansfield in his time saw that traders were operating largely outside the law because the medieval common law had been developed without them. He remedied this deficiency by bringing the law merchant into the common law. Similarly, he saw principles based on good conscience developing imperfectly on the equity side, and he created the beginnings of quasi-contrast on the law side. John Marshall in developing constitutional law looked primarily to the needs of the new nation as he went beyond what he found in the books to lay down

principles that would stabilize and guide the nation's growth. Chief Justice Doe of New Hampshire saw law as the servant of the people, not their unthinking master, and sought to bring into it the common sense that characterized his people's Spartan yet enlightened way of life. Cardozo took cases that other judges might have disposed of with easy reliance on old precedent and made great cases out of them. The greatness of his cases is the fact that they carried the law forward, away from outmoded limitations, to positions more commensurate with the changed conditions of a burgeoning economy. So it has always been with the score or so of American judges to whom history has accorded the topmost rank. They have all been men of vision and broad understanding, men willing and able to see, in their cases, more than the pettily important features of the single dispute." Leflar, *Honest Judicial Opinions,* 74 NW U.L. Rev. 721, 740 (1979)

"It was Dr. Leflar's thought that cases requiring a determination of public policy or the setting of important precedent should be reserved for the supreme court, with more routine cases going to the court of appeals." *Moose v. Gregory,* 267 Ark. 86, 590 SW 2d 662, 664 (1979)

II.

Other states have recognized the issues of undue influence, the proof thereof and the burden of proof thereof, as important matters of public policy and have by their strict enforcement of former precedents which strongly oppose any undue influence, largely eliminated the problem of undue influence. Volume 14 A of the Michigan Digest as to the topic "(F) Mistake, Undue Influence, and Fraud." Under Wills; shows

that non-reward eliminated "Undue Influence" issues, the last reported case being a 1973 case.

III.

Arkansas cannot claim a like record, since *Rose v. Dunn,* 284 Ark. 42, 679 S.W. 2d 180 (1984); at least three cases have been decided in which "undue influence" was a contended issue, a period of less than six months.

WHEREFORE, Appellant, based on Dr. Leflar's thoughts, and Supreme Court Rule 29 (4) (b), jurisdiction should be transferred to the Supreme Court, and this motion is being filed in the good faith and belief that the case should be so certified.

CARL WIDMER
WALTERS LAW FIRM, P.A.
P. O. Box 280
Greenwood, Arkansas 72936

By Bill Walters

CERTIFICATE OF SERVICE

I, Bill Walters, Attorney for Appellant, hereby certify that I have served a true and correct copy of the foregoing Motion upon Appeal by mailing said copy to his attorney of record, John T. Touhey, Attorney at Law, 311 Arlington Road, Redwood City, California 94062 this 3rd day of July, 1985.

Bill Walters

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

August 7, 1985

Bill Walters
Attorney at Law
P. O. Box 280
Greenwood, AR 72936

RE: CA85-217 Carl Widmer v. Raymond F. Widmer, Executor

Dear Mr. Walters:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Appellant's motion to certify to the Supreme Court is denied."

Sincerely yours,

DONA L. WILLIAMS, Clerk
Leslie W. Steen

DLW:mf
cc: John T. Touhey

IN THE COURT OF APPEALS
OF THE STATE OF ARKANSAS

CARL WIDMER ..... *Appellant*

v. NO. CA 85-217

RAYMOND F. WIDMER, EXECUTOR OF THE
ESTATE OF WALTER WIDMER, deceased ..... *Appellee*

PETITION FOR REHEARING AND BRIEF

Comes now the Appellant, and for his petition for rehearing states:

I.

That this Court's opinion of February 26, 1986, states in paragraph two as follows:

> "At the request of his father, Walter Widmer, the appellee, Raymond Widmer, accompanied his father to an attorney's office in August, 1975, for an initial consultation with Walter Widmer's attorney as to how he wanted his property distributed at the time of his death."

Appellant is unable to locate any evidence in the record of this case to establish that conclusion by the Arkansas Court of Appeals and for that reason Appellant moves that this matter be reheard.

II.

Even though there is testimony by the Appellee that is uncontroverted, the testimony is, as a matter of law, controverted testimony because of the Appellee's interest in the case. The Court's consideration of any of the Appellee's testimony, as uncontroverted,

would therefore, not be proper and this Court should rehear the case.

III.

Appellee's statements in open court on direct examination acknowledge and admit that the Will at issue was the result of Appellee's direct efforts. (Abstract Page 66-70, Tr. 212-220)

WHEREFORE, Appellant prays that this Court rehear this matter and that the Appellant be granted the relief prayed for.

CARL WIDMER

WALTERS LAW FIRM, P.A.
P. O. Box 280
Greenwood, Arkansas 72936
By Bill Walters

CERTIFICATE OF SERVICE

I, Bill Walters, Attorney for Appellant, hereby certify that I have served a true and correct copy of the foregoing Petition for Rehearing and Brief upon Appellee by mailing said copy to his attorney of record, John T. Touhey, 311 Arlington Road, Redwood City, California 94062 this 13th day of March, 1986.

Bill Walters

CERTIFICATE OF MERIT

This petition for rehearing is not filed for the purpose of delay but is filed for the purpose of giving the Appellant an opportunity to argue some very important points that have been set forth in Appellant's petition for rehearing.

Bill Walters

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Comes now the Appellant and for his brief in support of his motion for rehearing, states:

Lord Eldon, in 1804, made a statement that is as true now as it was then.

> ". . . that in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, that inquiry is so easily baffled in a Court of justice, that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression. . . And, therefore, if the Court does not watch these transactions, with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud. . ."
>
> *Hatch vs. Hatch*, 9 Ves. Jr. 292, 297, 32 Eng. Rep. 615, 617 (Ch. 1804).

This same theory has been restated time and time again.

> "Exactly which single incident provided the impetus for the creation for the Statute of Frauds is hard to ascertain. . . However, at least two authors attribute the Statute's provisions relating to wills to the almost successful fraud revealed in *Cole vs. Mordaunt*. In that case, a young wife almost successfully perpetrated a fraud against the beneficiaries of her elderly husband's written will. Nine witnesses testified to the veracity of her husband's nuncupative will, which supposedly left everything to his wife, and the revocation of his prior written will. Only on appeal to the delegates were the fraud and perjury revealed. In writing the opinion, Chancellor Nottingham expressed

hope that Parliament would soon see fit to enact legislation to prevent such evils. It is significant that Nottingham has been credited as one of the major authors of the Statute of Frauds."

Nelson and Starck, Formalities and Formalism: A Critical Look at the Execution of Wills," 6 Pepperdine L. Rev. 331, 338-39 (1979)

The Appellee is a very interested party in this case and his testimony was in his own best interest and as a matter of law, his testimony, whether contradicted by the Appellant or not, is contradicted testimony and should be so taken by the Court.

"The testimony of an interested party may not be taken as uncontradicted because his testimony is contradicted as a matter of law."

Nipper v. Brandon Co., 262 Ark. 17, 21, 553 S.W. 2d 27, 29 (1977)

The Courts have a protective function when it comes to guarding the validity of Wills which has been so stated in many decisions, an example of which follows:

"The requirement that the testator publish and declare the will to disinterested witnesses and that they attest in the testator's presence and in the presence of each other are meant to protect the testator from imposition at the time of execution. Functionally, the presence of multiple parties acts as a check against imposition by third parties and by parties present at the signing of the will. It is here, however, that the formalities requirements may have failed to live up to their purposes. While fraud may be practiced at the time of execution of the will, undue influence usually occurs over a

much longer period of time. Inherently, therefore, the fact that witnesses are disinterested or that they attest in the presence of each other is little safeguard against imposition."

Nelson and Starck, *Formalities and Formalisms A Critical Look at the Execution of Wills,* 6 Pepperdine L. Rev. 331, 352 (1979)

Charles Moore, in his Treatise on the Weight of evidence, made the following statements:

"793. Attorney's Memory of Execution of Documents. — Attorneys and their clerks, who witness wills almost daily, cannot be expected to remember for any considerable time whether or not another witness was present when a testator executed his will, or other circumstances attending its execution. Ten years after the execution of a deed by husband and wife, the conveyancer who drew the instrument testified that he read it to the grantors, but the court said it was "not at all unlikely that his recollection on that subject is not to be relied on."

"794. Attorney's Memory of His Attestations of Signatures. — Judge Ford of New Jersey declared that he could not call to mind ten out of every hundred attestations made by him as a subscribing witness, and that his statement would be corroborated by the experience of hundreds of others."

2 Charles C. Moore, A Treatise on Facts or the Weight and Value of Evidence (1908).

Law is a product of the social situation that it is concerned with, and law which fails to deal with or appreciate the real and honest social situation is like a physician that continues to follow practices that were

applicable fifty or a hundred years ago, when better methods have been established and advocated. This Court should accept the modern theories of undue influence and due process. In order to achieve justice in situations that exist, such as the one before this Court, this Court should, upon the establishment of a prima facie situation, that influence has been exerted in the making of a Will to shift the burden of proof to the person exercising the influence to establish to the Court's satisfaction that the influence was not undue or unjust. In this case, that result has not been obtained.

The U.S. Supreme Court made a very pointed example of the validity of these resources with what is cited in footnote eleven of *Brown vs. Board of Education of Topeka,* 347 U.S. 483, 494-495, 98 L. Ed. 873, 74 S. Ct. 696 (1954).

Thus, it is time for the Arkansas Courts to accept the changes that are occurring in society and to provide the protection for the citizens who many times are elderly in these situations and to put the burden of proving the lack of undue influence, duress, fraud and like activity on those persons putting themselves in the position of appearing to have used such methods.

In the *Cole vs. Mordaunt* case (cited in Pepperdine L. Rev. quote, supra), "Nine witnesses testified" to the "veracity" of the nuncupative Will — over twice the number of witnesses in this case, and truth still did not result. In that case, "the delegates" appreciated the presence of fraud and perjury — unfortunately in this case to date; today's "delegates" have still to appreciate activities of like nature in this case

and act to redress the wrong. Judge Souris, *In re Wood's Estate,* as discussed in Appellant's original brief, cited in treatise on Federal Evidence, which states:

> "The case involved a will contest and the presumption that where a confidential relationship is shown between a Will's beneficiary and the testator, it is presumed that the testator's execution of the will was procured by virtue of undue influence exercised of the beneficiary. In an analysis which is among the best of judicial attempts to explicate presumptions, the court summarized the instruction problem as follows:"
>
> 1 Louisell and Mueller, Federal Evidence, p.p. 576-577 (1977)

Every person having a case before any tribunal is entitled to basic due process and equal protection, which means that tribunal hearing in deciding the matter must take into consideration all matters that have bearing on the case. Matters that have bearing on a case are the social trends and conditions of the time, testimony of the parties, i.e. whether or not it is controverted. The testimony of an interested party may not be taken as uncontradicted because his testimony is contradicted as a matter of law. *Nipper vs. Brandon Co.,* supra.

The Court should take into consideration that attesting witnesses who attested a Will years ago most likely do not have independent memory of all of the facts occurring during the execution of the Will. Acts repeated in the course of duty by secretaries or other clerical personnel tend to blend into a seemingly memory but the fact is even though such a person seem-

ingly remembers a fact situation Courts have applied the principal of normal human behavior and have determined in most instances that such a memory is not probable, even though the person making such a statement believes that their memory is independent.

A relation can be made between such apparent memory and this Court's statement in its opinion that decedent requested his son, the Appellee, to accompany him to the attorney's office. Appellant is unable to locate any such testimony in the transcript. It is only by conditioning that such statements follow in the normal course, which is similar to the testimony of the attesting witnesses as to the execution of this Will.

More and more our country is becoming populated with elderly people whose rights must be dealt with as a new matter of law since in the past ages our society did not consist of such a larger portion of elderly people and therefore it is necessary that this Court address the situation requiring the protection of the elderly in cases such as the case before this Court. If this Court finds the law in the past was as is stated, then this Court should rehear this matter and determine on rehearing that the issues are important, not only to the elderly people, but to all people to establish that any time a person puts themselves in a position of exercising undue influence that they must account for such behavior and prove to a Court's satisfaction that the behavior exercised by such person was not in fact undue. In this case, this Court should apply such principles on rehearing.

Additionally, the denial of effective discovery in this case is added argument that this Court needs to

bring basic due process and equal protection concepts to bear on this entire area of the law.

CONCLUSION

Changes in the law are increasing at an increasing rate. For years the law was rather stable. Then during the industrial revolution, the law had to move with the times. Often times lagging years behind and now in the day of space travel and of much longer life spans, the law must move again and it is time that the law move ahead in the area of undue influence. It is the contention of this Appellant that this Court should move ahead in protecting the rights of elderly and for the protection of all persons and to determine that whenever anyone exercises conduct that influences another person in the making of a document and affecting that person's right, that such person be required to show proof that such influence was not undue or unjust. Further, the Appellant contends that for all of the reasons set forth above and in its petition for rehearing that this matter be reheard and that upon rehearing, this Court grant the Appellant the relief that the Appellant has prayed for.

Respectfully submitted,

WALTERS LAW FIRM, P.A.
#18 Town Square
P. O. Box 280
Greenwood, Arkansas 72936

(NOTE: A copy of the preceding Petition For Rehearing and Brief, in printed form was attached to each typewritten Petition For Review, as provided by Rule 29 (Appendix A, p. 9a); when the Petition For Review was presented to each Arkansas Supreme Court Justice.)

BEFORE THE SUPREME COURT
OF THE STATE OF ARKANSAS

CARL WIDMER ..... *Appellant*

v. NO. 86-55

RAYMOND F. WIDNER, EXECUTOR OF THE
ESTATE OF WALTER WIDMER, deceased ..... *Appellee*

PETITION FOR REVIEW

Comes now the Appellant, and for his petition for review of the decision of the Court of Appeals, states:

I.

Appellant contended from the beginning that this case should have been heard by the Supreme Court, pursuant to Rule 29 Section 1p as to Wills; and Section 4b, being both an issue of significant public interest, and concerning a legal principle of major importance. Law on undue influence in Arkansas, as it has existed in the past, does not afford due process and equal protection rights to those persons whose rights have been violated by others exercising undue influence.

II.

One of the fundamental issues in this case is that of burden of proof. The Court of Appeals has affirmed

a decision wherein it was freely admitted that a person other than the decedent influenced the making of a Will. The Court found that the Appellant failed to sustain his burden of proof of showing that such influence was undue. Appellant contends that it is unjust, the failure of due process, not to shift the burden of proof to the person exercising influence when it has been established by admission or otherwise that influence was exercised by a person present at the time of the making of the Will.

III.

The Courts, by failing to take this course of action are, in fact, protecting those who exercised undue influence. One recent Law Review article made these observations on the "protectors" inability to provide "safeguards":

> "It is here, however, that the formalities requirements may have failed to live up to their purposes. While fraud may be practiced at the time of execution of the will undue influence usually occurs over a much longer period of time. Inherently, therefore, the fact that witnesses are disinterested or that they attest in the presence of each other is little safeguard against imposition."
>
> Nelson and Starck, *Formalities and Formalism*: A Critical Look at the Execution of Wills, 6 Pepperdine L. Rev. 331, 352 (1979).

IV.

Robert A. Leflar, in his book, One Life in the Law, p. 274 (1985), stated that what is needed is a "doubting and questioning approach", see also pages 268-272. In fact, as to the rights of the elderly, the law of undue

influence is even less defensible that the situation that resulted in the decision in *Brown vs. School Board,* 347, U.S. 483 (1954).

V.

Additionally, the denial of effective discovery in this case is added argument that this Court needs to bring basic due proces and equal protection concepts to bear on this entire area of the law.

WHEREFORE, Petitioner asks this Court to finally abandon much of its legal thought on undue influence; and make full use of the extensive scientific knowledge on human behavior and conduct as it actually occurs in the real world, in the manner of *Brown,* supra. That Petitioner be granted all the relief prayed for, for the reasons stated in Appellant's Brief.

CARL WIDMER

WALTERS LAW FIRM, P.A.
P. O. Box 280
Greenwood, Arkansas 72936
By Bill Walters

CERTIFICATE OF SERVICE

I, Bill Walters, certify that I have served a copy of the Petition for Review upon Appellee by mailing said copy to John T. Tuohey, Attorney for Appellee, 311 Arlington Road, Redwood City, California 94062 this 12th day of March, 1986.

Bill Walters

CERTIFICATE OF MERIT

This petition for review is not filed for the purpose of delay but is filed for the purpose of giving the Appellant an opportunity to argue important points that have been set forth in Appellant's petition for rehearing.

Bill Walters